

**A Guide to  
Ethical Issues  
and  
Right of First Refusal  
Considerations  
in  
A-76 Studies  
at  
Marine Corps Activities**  
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Prepared by: Lee Gale, Head, Labor and Employee Relations Section  
Civilian Personnel Policy Branch (MPO-37)  
Manpower Plans and Policy Division  
Manpower and Reserve Affairs

## FOREWORD

A major challenge facing the Marine Corps now and into the foreseeable future is how to deal with the myriad of issues surrounding competitive sourcing studies accomplished under Office of Management and Budget Circular A-76. For civilian Marines working on these studies, the answers to questions concerning the right of first refusal and other ethical issues are of the utmost importance. Navigating the maze of laws and regulations dealing with these issues can be daunting.

This Guide was prepared in answer to requests from the field for guidance on navigating the myriad laws and regulations dealing with ethical considerations and the right of first refusal as they relate to studies conducted under OMB Circular A-76. The material is not new, but is a compilation of information gathered from a variety of sources both within the Marine Corps and from our sister services and outside agencies. A special thanks goes to Bob Altig, Competitive Sourcing Manager, Fort Lewis, Washington, who developed the matrix on "Avoiding Conflicts" and who very graciously allowed us to adapt it to Marine Corps use. Special thanks also to our friends in the Department of the Navy Human Resources Operations Center and Human Resources Service Center Northwest, for developing the Civilian Human Resources Competitive Sourcing Guide from which I was able to gather a great deal of very useful information. Finally, thanks to the staff of the Office of Counsel and the Installation Reform Office at Headquarters Marine Corps for their assistance and suggestions in the preparation of this document.

The narrative portion of the guide is geared toward those users who need an in-depth understanding of the ethics laws and regulations governing questions concerning right of first refusal and post-Federal employment. We envision that primary users will be ethics counselors, and legal advisors to commanders.

The matrix is designed as an easily understood quick, ready reference for Commercial Activity Team members and employees involved in A-76 studies. **The guidelines presented in the matrix are advisory in nature. All cases are fact specific and an employee's individual circumstances could impact his or her rights and obligations under Federal law and DoD/DON/Marine Corps guidance. Employees should always contact both the immediate supervisor and the local ethics counselor for specific guidance and advice in individual cases.**

# **ETHICS ISSUES RELATED TO PARTICIPATION IN OMB A-76 COST COMPARISONS AND EXERCISE OF THE RIGHT OF FIRST REFUSAL AT MARINE CORPS ACTIVITIES**

## **I. Introduction**

Involvement in the A-76 process invokes the application of certain ethical principles. The following comments are provided to alert those employees who will be involved in the A-76 study process about the restrictions that may affect either their Federal employment or future job opportunities.

OMB Circular A-76, Performance of Commercial Activities and Circular No. A-76, Revised Supplemental Handbook Performance of Commercial Activities of March 1996, establish Federal policy regarding how the government will perform commercial activities, i.e., with a governmental most efficient organization (MEO) or by contract. The purpose of this document is to provide Marine Corps employees, ethics counselors and other interested parties guidance on the applicability of the ethics laws and regulations to the conduct of an A-76 cost comparison. Several statutory and regulatory provisions relating to ethics and standards of conduct apply to Federal employees involved in the A-76 process. Each should be read independently, even though they appear to be duplicative. Each was written at a different time and for a different purpose. A number of substantive areas where ethical considerations come into play and the statutes and regulations related to each are discussed. Questions and answers, which amplify and explain the text, are included with each section.

As a general rule, Marine Corps employees are permitted to fully participate in A-76 studies as long as certain cautionary steps are taken to comply with applicable laws and regulations. This guidance will make it easier for Marine Corps employees to participate fully in the A-76 process. Questions of interpretation of the material contained in the document should be referred to command ethics counselors.

OMB Circular A-76 and its supplement set out a methodology for activities to use in studying whether it is more economical to perform commercial activities in-house or to contract out certain functions. During the course of an A-76 cost comparison study, the Government analyzes its operations to determine its Most Efficient Organization (MEO) and produces a cost estimate based upon a Performance Work Statement (PWS). A solicitation using the same performance work statement is released to offerors. The solicitation requires, among other things, a successful offeror to provide the right of first refusal of employment to government personnel adversely affected by contractor performance of the function. This provision applies only if the cost comparison results in a decision that it is more economical to convert the function to contract performance.

## **II. Conflicts of Interest for Current Federal Employees: 18 U.S.C. 208 and DoD Joint Ethics Regulation (JER) 5500.7-R**

18 U.S.C. 208 prohibits a Federal employee from personally and substantially participating (through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise) in any particular matter that has a direct and predictable effect on the employee's financial interests. The statute also covers the financial interests of anyone for whom the employee is working, anyone with whom the employee is negotiating for employment, or anyone with whom the employee has an arrangement concerning prospective employment. DoD JER 5500.7-R goes beyond 18 U.S.C. 208 and prohibits taking official action regarding the financial interests of anyone with whom the employee is seeking employment. In addition, under 5 C.F.R. 2635.502, there is a prohibition against taking official actions with respect to organizations when there is an "appearance" of a conflict of interest. In the A-76 arena, there are two interests where this statute and related regulatory provisions may apply: the employee's interest in a non-government job; and the employee's interest that arises from salary and benefits from his or her Federal government job. In this context, "substantial participation" means that the employee's involvement is of significance. It requires more than official responsibility or knowledge or involvement on an administrative or peripheral issue. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.

Marine Corps employees should not work on a matter if a reasonable person who is aware of the circumstances would question their ability to be impartial in the matter. Employees should consult with their supervisors and ethics counselors to assist them in resolving any questions of perceived loss of impartiality. Employees should also be aware that contracting actions, especially those potentially impacting the positions of Federal employees, need to be fundamentally fair and avoid organizational conflicts of interest: a situation in which, because of other activities or relationships, an employee is unable or potentially unable to render impartial assistance to the government; the employee's objectivity is or might be impaired; or, the employee has an unfair advantage.

*Q. In an A-76 context, when does 18 U.S.C. 208 apply to individual Marine Corps civilian employees?*

A. For officials participating in the PWS or MEO, we look to whether that participation will have a direct and predictable effect on the employee's personal or imputed financial interest. **The answer to this question depends on the specific facts and individual circumstances of the employee concerned and individual cases should be referred to the command ethics counselor.**

*Q. When are the financial interests of a non-Federal entity imputed to the employee under 18 U.S.C. 208?*

A. Financial interests of a non-Federal entity are imputed to the employee when the non-Federal entity with a financial interest in the outcome of a particular cost comparison enters into employment negotiations with the employee or offers a job to a Marine Corps

employee while that employee is participating in that cost comparison. Whether it constitutes personal and substantial participation and if so, whether such participation will have a direct and predictable effect on the financial interests of the non-Federal entity making the offer of employment **must be determined based upon the facts and circumstances of the particular case. All such cases must be referred to command ethics counselors.**

*Q. Are Cost comparisons under A-76 considered "particular matters" under 18 U.S.C. 208?*

A. Yes, because they are acquisitions under OMB Circular A-76 and Subpart 7.3 of the FAR. In addition, the components of the cost comparison (such as developing the PWS or MEO) are particular matters also.

*Q. What type of participation in an A-76 cost comparison study is covered by 18 U.S.C. 208?*

A. Each employee's participation must be reviewed to determine if the specific nature of the participation is personal and substantial, and whether that participation will have a direct and predictable effect on the employee's financial interest. Ordinarily, providing technical data to either an MEO or PWS is unlikely to have a direct and predictable effect on either the final in-house or contract offers. Such participation should be reviewed to ensure that the input by the employee does not give any private sector offeror or in-house performance an advantage. An employee who serves in a supervisory position and does not have authority to make a contracting out decision is not automatically covered by Section 208. Participation in a supervisory capacity should be reviewed more closely to determine whether such participation could reasonably have a direct and predictable effect on the employee's financial interest.

*Q. If a cost comparison results in a determination to contract, does that equate to an offer of employment for every displaced government employee?*

A. No, because the contractor is under no obligation to create a job for every displaced government employee. The contractor is, however, obliged, to offer displaced government employees the first refusal for jobs for which they are qualified that are created by the award of the contract.

*Q. What happens if 18 U.S.C. 208 applies?*

A. The individual must either reject the possibility of exercising a right of first refusal for employment with the contractor, notify his or her supervisor of the need to be disqualified from any further participation, or seek a written waiver under 18 U.S.C. 208(b). A violation of 18 U.S.C. 208 may result in a criminal prosecution.

*Q. Do the appearance standards of 5 C.F.R. 2635.502 apply?*

- A. Yes, if the employee knows that the parties are interested in the outcome of the cost comparison. The appearance standards should always be considered in any analysis of issues related to A-76. But even under the appearance standard, the right of first refusal, standing alone, does not create the appearance of a conflict.

## **1. The Employee's Interest in a Non-Government Job**

The JER prohibits an employee from personally and substantially participating in matters that have a direct and predictable effect on companies with whom they are seeking employment (5 C.F.R. 2535 subpart F). Seeking employment begins when there is a communication by either the employee or the company regarding potential employment. The JER requires the employee to notify his or her supervisor whenever there is a conflict (JER 2-204). Under these provisions, the employee must notify his or her supervisor if contacted regarding employment if the employee can have a direct, predictable effect on the potential employer. Unlike the Procurement Integrity Act, which contains an exception regarding the notification and disqualification requirements for actions taken regarding the MEO and PWS, neither 18 U.S.C. 208 nor the Standards of Conduct contains such an exception. The right of first refusal, standing alone, in either solicitation or eventual contract, is not "seeking employment" under the Standards of Conduct, or an arrangement regarding future employment under 18 U.S.C. 208.

An employee who personally and substantially participates in developing the MEO or PWS who is contacted by a potential offeror regarding work has an obligation to notify his or her superior and to disqualify him- or herself under the Standards of Conduct or 18 U.S.C. 208, particularly if the employee intends to pursue the likelihood of potential employment. Such an obligation only arises when continued work on the MEO or PWS would have a direct and predictable effect on the potential offeror. Ordinarily, work on the PWS is unlikely to have a direct and predictable effect on any offeror.

**These determinations are highly fact specific and require an ethics counselor to judge each case on its facts.**

*Q. Does 18 U.S.C. 208 apply to potential employment opportunities under the right of first refusal for employees involved in the preparation of the PWS or MEO?*

- A. No. It does not apply at the time of the preparation of the PWS or MEO because the potential employment offer under the right of first refusal is highly speculative. Further, the right of first refusal is not an arrangement concerning employment by the employee, nor is it a negotiation for employment.

*Q. Do the exclusions from the definition of personal and substantial in FAR 2.104-3 apply to 18 U.S.C. 208?*

- A. No, because the language in the FAR only applies to the Procurement Integrity Act. The FAR does not interpret 18 U.S.C. 208. For the definitions of personal and substantial under 18 U.S.C. 208, see 5 C.F.R. 2640.103(a)(2).

## **2. The Employee's Interest That Arises From His or Her Federal Job**

The second area of potential conflict occurs when the employee is personally and substantially involved in matters that may affect his or her salary and benefits from his or her Federal government job. The Office of Government Ethics has exempted interests arising from Federal employment from the coverage of 18 U.S.C. 208 except for cases where the employee makes determinations that specifically affect his or her own salary or benefits (5 C.F.R. 2640.203(d)). Employees may participate in the A-76 cost comparison, MEO, and PWS without violating 18 U.S.C. 208 because these actions do not specifically affect their own salary or benefits. Because the final decision is contingent upon an involved cost comparison process with many distinct variables, this conflict is unlikely to arise until after the decision has been made to contract.

If the cost comparison results in a decision to contract out, employees who are seeking or negotiating for employment with the contractor may not be involved in making decisions that have a direct and predictable effect on the contractor. For example, the employee could not be involved in determining what government equipment should be transferred to the contractor. It may be necessary to issue individual waivers under 18 U.S.C. 208(b)(1) to allow affected government employees to make decisions once the contracting out decision has been made.

**NOTE:** The right of first refusal is neither seeking nor negotiating for employment under 18 U.S.C. 208 or the JER.

*Q. Do financial interests that arise from government salary and employment constitute disqualifying financial interests under 18 U.S.C. 208(a)?*

- A. Yes, but there is an exemption under authority of 18 U.S.C. 208(b)(2). An employee may participate in such activities provided he or she does not make any determination that has a special or individual effect on his or her salary or benefits.

*Q. Does the PWS or MEO have any special or individual effect on salaries and benefits of the employees involved in such activities?*

- A. No. An employee's interest in his or her Federal employment, even when the employee's position might ultimately be eliminated, is not a disqualifying interest for participation in development of the PWS or MEO.

## **III. Representation Restrictions for Current Federal Employees, 18 U.S.C. 203 and 205**

18 U.S.C. 203 and 205 together prohibit Federal employees from representing anyone else before the Federal government. In A-76 situations, employees may be asked by the contractor to advocate the contractor's position in disputes with the government. So long as the employee remains a Federal employee, such representational activity is prohibited.

#### **IV. Post-Government Employment Considerations, 18 U.S.C. 207 (The Ethics in Government Act)**

Once a function is contracted out, 18 U.S.C. 207 is the principal statute that may limit the scope of duties that an employee may perform for the contractor. Section 207(a)(1) prohibits a former employee from making a communication or appearance with intent to influence the Federal government on any particular matter he or she participated in personally and substantially, which involved a specific party or parties. In order for the restrictions to apply, an employee must be personally and substantially involved in a "particular matter" that involved "specific parties" at the time of the employee's participation in the matter.

*Q. Does 18 U.S.C. 207 prohibit employment of Marine Corps employees with any private entity involved in the A-76 process?*

A. No, it only prohibits communications back and appearances with the intent to influence. Even if 18 U.S.C. 207 applies, a government employee could work with a contractor in connection with the same particular matter handled as a government employee, but could not engage in representational activities on behalf of the contractor.

##### **1. Particular Matter (Defined)**

A particular matter includes any investigation, application, and request for a ruling, determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.

In an A-76 context, many of the steps leading up to the solicitation may be particular matters. The solicitation, contract, MEO, PWS, and government estimate may all be particular matters. Participation in the development of one particular matter does not necessarily result in an employee being involved in a related particular matter.

##### **2. Specific Parties (Defined)**

Section 207(a)(1) is only applicable if, at the time of an employee's participation in the matter, there were specific parties identified. Ordinarily, specific parties are not identified until a potential offeror has expressed some interest in the matter. At the latest, specific parties are identified when proposals are received or bids opened. Specific parties can also be identified when the activity receives a request for a copy of the solicitation, or participation in a pre-solicitation conference. The PWS is developed early in the solicitation, and it is unlikely that any potential parties have identified themselves to the Government at that time. An employee who only participated in development of the PWS will usually be able to represent back to the Government if a contract is awarded.

*Q. What is the starting point for determining whether 18 U.S.C. 207 applies to employees involved in the preparation of the PWS or MEO?*



- A. Whether, at the time of their involvement, the cost comparison has progressed to the point where it involves "specific parties." In most instances, because the work occurs at a very preliminary stage of the process, there will not be any expression of interest in a particular cost comparison at the time that the PWS and MEO are being developed. In such cases, these provisions would not apply and would have no effect on the right of first refusal.

### **3. Other Restrictions in 18 U.S.C. 207**

18 U.S.C. 207(a)(2) prohibits the same type of representations a (a)(1) for 2 years, but applies to particular matters actually pending under an employee's official responsibility during their last year of government service that involved a private party. This requires only that the matter be pending under the employee's official authority. Private parties must be identified at the time it was pending under the employee's authority for the restriction to apply. A determination of what is under an employee's authority must be made on a case by case basis. The Office of Government Ethics has opined that even when an employee disqualifies him- or herself under 18 U.S.C. 208, that matter is still under his or her official authority for purposes of 18 U.S.C. 207(a)(2).

18 U.S.C. 207(c) prohibits senior military officers and senior civilian employees (SES 5 and above) from representing back to their department on any matter for one year. These senior people may not represent back to the Marine Corps (or Department of the Navy), regardless of whether they ever had anything to do with the matter.

## **V. Restrictions of the Procurement Integrity Act for Current and Former Federal Employees**

The Procurement Integrity Act (41 U.S.C. 423) contains three provisions potentially applicable in an A-76 context: the prohibition on the release of certain information; the notification and disqualification requirements; and, post-government employment restrictions.

### **1. Restrictions on the Release of Information**

The Procurement Integrity Act prohibits the release of "contractor bid or proposal information," and "source selection information." Employees who have access to information regarding contractor bids may not disclose that information to any person including another government employee not authorized to receive such information. In an A-76 cost comparison, the government estimate is ordinarily source selection sensitive information and may not be disclosed.

*Q. Is an employee who participates in the preparation of a PWS or developing an MEO subject to the provisions and restrictions on disclosing or obtaining procurement information in the Procurement Integrity Act?*

- A. Yes. FAR 3.104-5 prohibits disclosing of contractor bid or proposal information and source selection information regardless of how or when it is obtained. The prohibition

applies even when an employee learns of such information inadvertently or through another person's inappropriate disclosure.

## **2. Notification and Disqualification Requirements**

The Procurement Integrity Act requires employees who participate personally and substantially in a procurement to report employment contacts, and to disqualify themselves from participation in the procurement unless they reject the possibility of employment. Employees who are personally and substantially involved in the development of the PWS, and other employees who participate personally and substantially in the procurement process are subject to the reporting and disqualification provisions of the Act. These provisions are triggered by an employment contact between the employee and one of the offerors. The solicitation provision that grants adversely affected employees the right of first refusal for employment, standing alone, is not an employment contact. An employment contact does not arise until there is communication between the employee and an offeror regarding employment.

In addition, FAR 3.104-3 provides that the following activities are not "substantial" for the purposes of the Procurement Integrity Act:

1. Participation in Management Studies,
2. Preparation of the in-house cost estimate,
3. Preparation of the MEO,
4. Furnishing data or technical support to be used by others in the development of the PWS, statement of work, or specifications. Employees whose actions are limited to the above areas are not subject to the reporting and disqualification provisions of the Act.

### **CA Team members should report all employment contacts in writing to the CA Team Leader or Program Manager.**

If an employee immediately and clearly rejects the possibility of employment, he or she may work on matters affecting the contractor. If a clear and immediate rejection of the possibility of employment is not made, an employee may not perform any substantial work on any matters affecting the contractor and must provide written notice of disqualification to the supervisor.

If the matters are so central or critical to an employee's duties that work performance would be materially impaired if the employee had to stop working on them, the employee may be required to take annual leave or leave without pay while seeking employment with the contractor. Appropriate administrative action may be taken if the employee is unable to perform the duties of his or her position.

If the employee has not worked on a matter that affects a contractor because they are seeking employment, and employment discussions end with no offer of future employment, or if 60 days have passed since a resume was presented to the contractor and no discussions have occurred, supervisors may decide if employees may then be assigned to such a matter.

When an employee starts negotiating for employment, only a waiver would allow the employee to perform substantial work on the matters. To grant a waiver, an agency appointing official must determine that the employee's interest in employment with the contractor, as well as the contractor's interest in the matter, are not "so substantial as to be deemed likely to affect the integrity of the employee's services." DoD recommends that ethics counselors and appointing officials carefully scrutinize the granting of waivers in the light of all the facts and circumstances.

*Q. Under the Procurement Integrity Act, are employees who participates in management studies, preparing an in-house estimate, preparing MEOs, and furnishing data or technical support participating personally and substantially such that an employment contact must be reported?*

A. No. They are not required to report employment contacts solely because of this activity. As discussed elsewhere, they may be required to disclose that activity under 18 U.S.C. 208 and the JER.

*Q. Do the employment contact provisions of the Procurement Integrity Act apply to individuals who only participate in preparing an MEO?*

A. No. The employment contact provisions of the Procurement Integrity Act only apply when an individual is personally and substantially involved in agency procurement. FAR 3.104-3 excludes participation in MEO analysis from the definition of personal and substantial participation in procurement.

*Q. If an employee's role is strictly limited to furnishing data or technical support to others who actually develop the PWS, do the employment contract provisions apply?*

A. No, particularly if the employee acted as a technical advisor to the PWS development team, rather than as a full member. If that employee's participation exceeds that of a technical advisor, he or she would be required to report any contact concerning post-government employment from a bidder or offeror and either reject the employment offer or disqualify him- or herself from further participation in the cost comparison.

*Q. Is the right of first refusal an employment contact within the meaning of the Procurement Integrity Act?*

A. No, because the right of first refusal arises subsequent to the award. The employment contact provisions of the Procurement Integrity Act do not affect an employee's opportunity to accept employment. If an employee actually discusses potential employment with a non-government entity, that constitutes an employment contact under the Procurement Integrity Act.

*Q. At what point is an employee not required to report employment contacts under the Procurement Integrity Act?*

- A. At contract award, because award is the end point of a party's status as a bidder or offeror. 18 U.S.C. 208 and the JER may require reporting the contact.

### **3. Post-Government Employment Restrictions**

The Procurement Integrity Act also prohibits certain officials from working for a contractor for one year from the end of a person's participation in certain functions if the contract in question was for more than \$10,000,000. The procuring contractor officer, source selection authority, members of the source selection board, chief of a financial or technical evaluation team, program manager, deputy program manager, and administrative contracting officer are subject to this ban. This provision applies to procurements that are undertaken as part of an A-76 cost comparison.

*Q. Who is affected by the post-government employment restrictions of the Procurement Integrity Act?*

- A. Those persons serving in a procurement in excess of \$10 million in any of the following positions:
1. Procuring contracting officer
  2. Source selection authority
  3. Member of a source selection evaluation board
  4. Chief of a financial or technical evaluation team
  5. Program manager
  6. Deputy program manager
  7. Administrative contracting officer;

or any person who personally made any one of the following decisions:

1. Decision to award a contract over \$10 million
2. Decisions to award a subcontract over \$10 million
3. Decision to award a modification of a contract or subcontract over \$10 million
4. Decision to award a task order or delivery order over \$10 million
5. Decision to establish overhead or other rates for a contract valued over \$10 million
6. Decisions to approve contract payments over \$10 million
7. Decision to pay or settle a contract claim over \$10 million

*Q. When does the 1-year bar on post-government employment under the Procurement Integrity Act begin for the individuals identified in the previous question?*

- A. The one-year period is measure as follows:
1. If the employee is serving as the Procuring Contracting Officer, the Source Selection Authority, a member of the Source Selection Evaluation Board, or the Chief of the Financial or the Technical Evaluation Team, on the date of the selection of the

contractor--but not on the date of the award of the contract--the prohibition begins on the date of the selection of the contractor.

2. If the employee is serving as the Procuring Contracting Officer, the Source Selection authority, a member of the Source Selection Evaluation Board, or the Chief of the Financial or the Technical Evaluation Team on the date of the award of the contract, then the prohibition begins on the date of the award of the contract.
3. If the employee is serving as the Program Manager, the Deputy Program Manager, or Administrative Contracting Officer, the prohibition begins on the last date that the individual served in that position.
4. If the employee made one of the decisions listed above, the prohibition begins on the date the decision was made.

*Q. Are employees who participate on the MEO Development Team or the PWS Development Team subject to the post-government employment restrictions of the Procurement Integrity Act?*

- A. No, unless they are one of the designated officials set forth in the previous questions under this section.



## AVOIDING CONFLICTS: PARTICIPATION IN COMMERCIAL ACTIVITIES STUDIES

IF YOU CONTRIBUTE TO OR WRITE THE PWS, THEN:	IF YOU CONTRIBUTE TO THE MANAGEMENT STUDY (MS) BY SUGGESTING MEO IMPROVEMENTS THEN:	IF YOU STRONGLY INFLUENCE OR APPROVE THE MOST EFFICIENT ORGANIZATION (MEO), THEN:	IF YOU CONTRIBUTE TO THE INDEPENDENT GOVERNMENT ESTIMATE (IGE), THEN:	IF YOU CONTRIBUTE TO THE TECHNICAL PERFORMANCE PLAN, THEN:	IF YOU CONTRIBUTE TO THE QUALITY ASSURANCE SURVEILLANCE PLAN (QASP), THEN:	IF YOU DEVELOP OR KNOW THE IN-HOUSE COST ESTIMATE (IHCE) (GOVT BID), THEN:	IF YOU ARE PART OF THE SOURCE SELECTION EVALUATION BOARD (SSEB), THEN:	IF YOU ARE THE SOURCE SELECTION AUTHORITY (SSA), THEN:
<b>You <u>RETAIN your RIGHT OF FIRST REFUSAL</u></b>	You <b>CAN</b> contribute to or write the PWS	You <b>CAN</b> contribute to or write the PWS	You <b>CAN</b> contribute to or write the PWS	You <b>CAN</b> contribute to or write the PWS	You <b>CAN</b> contribute to or write the PWS	You <b>CAN</b> contribute to or write the PWS	You <b>CAN</b> contribute to or write the PWS	You <b>CAN</b> contribute to or write the PWS
	<b>You <u>RETAIN your RIGHT OF FIRST REFUSAL</u></b>	You <b>CAN</b> participate in the Management Study	You <b>CANNOT</b> participate in the Management Study	You <b>CAN</b> participate in the Management Study	You <b>CAN</b> participate in the Management Study	You <b>CAN</b> participate in the Management Study	You <b>CANNOT</b> participate in the Management Study	You <b>CANNOT</b> participate in the Management Study
		<b>You <u>LOSE your RIGHT OF FIRST REFUSAL</u></b>	You <b>CANNOT</b> have any knowledge of the MEO or in-house bid	You <b>CAN</b> have knowledge of the MEO	You <b>CAN</b> have knowledge of the MEO	You <b>CAN</b> have knowledge of the MEO	You <b>CANNOT</b> have any knowledge of the MEO or in-house bid	You <b>CANNOT</b> have any knowledge of the MEO or in-house bid
			<b>Your <u>RIGHT OF FIRST REFUSAL is at risk, see your ethics counselor</u></b>	You <b>CANNOT</b> participate in developing the IGE	You <b>CANNOT</b> participate in developing the IGE	You <b>CANNOT</b> participate in developing the IGE	You <b>CANNOT</b> participate in developing or know the IGE	You <b>CANNOT</b> participate in developing or know the IGE
				<b>You <u>RETAIN your RIGHT OF FIRST REFUSAL</u></b>	You <b>CAN</b> develop the TPP	You <b>CAN</b> develop the TPP	You <b>CANNOT</b> develop the TPP	You <b>CANNOT</b> develop the TPP
					<b>You <u>RETAIN your RIGHT OF FIRST REFUSAL</u></b>	You <b>CAN</b> develop the QASP	You <b>CANNOT</b> develop the QASP	You <b>CANNOT</b> develop the QASP
						<b>You <u>LOSE your RIGHT OF FIRST REFUSAL</u></b>	<b>You <u>SHOULD NOT be a member of the function under study. See your ethics counselor.</u></b>	You <b>CANNOT</b> be a member of the SSEB
							<b>Your <u>RIGHT of FIRST REFUSAL is at risk. See your ethics counselor.</u></b>	<b>Your <u>RIGHT of FIRST REFUSAL is at risk. See your ethics counselor.</u></b>

- **THESE ARE ADVISORY GUIDELINES. All cases are fact specific and your individual circumstances could impact your rights and obligations under Federal law and DoD/DON/Marine Corps guidance. This includes your Right of First Refusal for jobs with a contractor. You should contact both your supervisor and your local ethics counselor for specific guidance.**
- Providing advice, input, or suggestions regarding the MEO, IHCE, or IGE would not put your Right of First Refusal at risk. If the cumulative effect is such that you influence or have knowledge of substantial portions of those documents then your Right of First Refusal is at risk.
- If you approve all or part of the PWS, MS, MEO, IHCE, or IGE, then you **LOSE** your Right of First Refusal.
- If you are approached in any manner by any prospective offeror about post-Federal employment, then you must notify your supervisor in writing, and should contact an ethics counselor immediately.
- Any firm or individual requesting information about a CA study, or your organization's staffing or operations should be referred to the Commercial Activities Manager. **DON'T ANSWER THE QUESTIONS.** The requester will be referred to the appropriate release authority.

**REMEMBER: THESE ARE ADVISORY GUIDELINES ONLY. IF YOU HAVE ANY DOUBTS OR QUESTIONS, CONTACT YOUR SUPERVISOR AND/OR ETHICS COUNSELOR.....FIRST.**

## **DEFINITIONS**

1. **PERFORMANCE WORK STATEMENT (PWS)**: Statement of technical, functional and performance characteristics of the work being considered for competitive sourcing. The PWS is the basis for in-house and any potential contractor "bids" and performance.
2. **RIGHT OF FIRST REFUSAL (ROFR)**: Requirement that a winning contractor give government employees who have been, or will be, adversely affected or separated as a result of award of the contract the right of first refusal for employment openings under the contract in positions for which they are qualified. The employment must be consistent with post-government employment conflict of interest standards. ROFR applies to all affected employees to include those impacted by the another employee exercising "bump" or "retreat" rights in a reduction in force (RIF).
3. **MANAGEMENT STUDY (MS)**: Identifies the government's Most Efficient Organization (MEO), including staffing and operating procedures, to perform the commercial activity in-house.
4. **MOST EFFICIENT ORGANIZATION (MEO)**: The government's streamlined in-house organization developed to compete with bids of outside contractors to perform commercial activities. The MEO, which is developed from the PWS, is a product of the MS and provides the basis for in-house cost on the Cost Comparison Form.
5. **INDEPENDENT GOVERNMENT ESTIMATE (IGE)**: The government's estimate of the costs the private sector would charge to perform the commercial activity. The IGE is used by the Contracting Officer to evaluate contractor-submitted bids and proposals. The IGE is not the in-house bid.
6. **TECHNICAL PERFORMANCE PLAN (TPP)**: A product of the management study. Contains description of management capabilities, personnel qualifications, performance history, delivery schedule compliance, and technical capability. The TPP reflects the MEO and is sealed prior to the consideration of any part of any contract offer.
7. **QUALITY ASSURANCE SURVEILLANCE PLAN (QASP)**: The document which ensures the systematic inspection of the required services; not part of the PWS. The QASP is used to monitor contractor or in-house performance under the MEO to ensure compliance with the PWS.
8. **IN-HOUSE COST ESTIMATE (IHCE)**: Also known as the "in-house bid", the IHCE is the government's bid, based on the MEO (the staffing and resources required to do the work in the PWS. The IHCE, and management study (including the MEO and TPP, are sealed and revealed only after all contractor bids/offers have been fully considered.
9. **SOURCE SELECTION EVALUATION BOARD (SSEB)**: Group of government personnel representing the various functional and technical disciplines relevant to an acquisition. The SSEB conducts a comprehensive evaluation of each offeror's proposal and recommends the best value bid or proposal to the Source Selection Authority (SSA).
10. **SOURCE SELECTION AUTHORITY (SSA)**: Normally the Contracting Officer or other knowledgeable senior government official from outside the command undergoing the A-76 cost comparison.